NATIONAL WILDLIFE FEDERATION
CITIZENS' COAL COUNCIL
WEST VIRGINIA HIGHLANDS CONSERVANCY

IBLA 95-322, etc. 1/ Decided June 27, 2000

Consolidated petitions for award of costs and expenses, including attorney fees, under section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994).

Petitions granted in part; attorney fees and expenses awarded.

1. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

   An award of attorney fees, pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1275(e) (1994), and its implementing regulations, 43 C.F.R. §§ 4.1290 to 4.1296, is guided by the number of hours reasonably expended in prosecuting a citizen's complaint and request for informal review before OSM and an appeal to the Board, all of which resulted in favorable action by OSM, as well as time spent in seeking the award. A fee award is also guided by the reasonable hourly rate for the work of the attorneys who prosecuted those actions.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

   Where a petitioner seeking attorney fees achieves substantial success on the merits of his claim, the fee award properly includes all time reasonably expended on the litigation including presentation

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1/ The following petitions for attorneys fees are considered herein: IBLA 95-322, 95-323, 95-324, 95-325, 95-326, and 95-476. The six petitions are listed in Appendix 1, along with the serial numbers of the underlying previous actions before the Office of Surface Mining Reclamation and Enforcement (OSM) and this Board.

of an alternative ground for success arising from the same facts and involving a related legal theory even though the alternative argument was rejected.

APPEARANCES: L. Thomas Galloway, Esq., Boulder, Colorado, and Walton D. Morris, Jr., Esq., Charlottesville, Virginia, for petitioners; Thomas A. Bovard, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

The National Wildlife Federation (NWF), Citizens' Coal Council (CCC), and West Virginia Highlands Conservancy (WVHC) (petitioners or citizens) have filed six petitions for award of fees and expenses (petitions) relating to appeals arising out of their multiple citizens' complaints requesting Federal inspection and enforcement action against various coal mining concerns. The petitions are filed pursuant to section 525(e) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1275(e) (1994).

The petitions arise from a March 8, 1995, settlement between petitioners and OSM of the citizens' appeals of OSM decisions pertaining to six citizen complaints filed by petitioners with OSM in 1993. The settlement resolved a dispute between the parties concerning OSM's implementation of 30 C.F.R. Part 733. 2/ We consolidated the six petitions on June 30, 1999.

In mid-August 1993, petitioners filed six citizen complaints with OSM field offices, two with the Big Stone Gap (Virginia) Field Office (BSGFO) and four with the Charleston (West Virginia) Field Office (CHFO). The petitions principally alleged that Virginia and West Virginia State mining programs had issued permits to coal operators in violation of "ownership and control" regulations promulgated pursuant to section 510(c) of SMCRA, 30 U.S.C. § 1260(c) (1994). 3/ Petitioners alleged generally

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2/ Our review of these petitions was suspended by request of the parties during most of their pendency before this Board, awaiting our decision in Kentucky Resources Council v. OSM (KRC v. OSM), 137 IBLA 345 (1997); judicial review of that decision (including the District Court's award of fees and expenses in that case, issued on Mar. 5, 1999); the Board's opinion awarding fees and expenses on judicial remand in Kentucky Resources Council, Inc. v. OSM (On Judicial Remand) (KRC v. OSM (On Judicial Remand), 151 IBLA 324 (2000); and unsuccessful settlement negotiations.

3/ Section 510(c) provides:

"Where * * * information available to the regulatory authority indicates that any surface coal mining operation owned or controlled by the applicant is currently in violation of this chapter or other laws referred to [in] this subsection, the permit shall not be issued until the applicant submits proof that such violation has been corrected or is in the process of being corrected * * *."

that certain coal companies had contracted to receive coal from subcontractors (sometimes called "contract miners") and that the contract miners had either abandoned the mining sites under contract or failed to reclaim them. Petitioners charged that the companies had failed to disclose these pertinent facts in subsequent permit applications filed with either Virginia or West Virginia (States). Petitioners asserted that the States had issued new, expanded, or revived permits to the enumerated companies despite the fact that they (or contract miners under their control) had failed to reclaim certain mining sites. The complaints maintained that the permits issued to the enumerated companies were therefore "improvidently issued" and should be revoked. Some of the complaints further contended that the States should issue "permit blocks" against the companies until all reclamation on the related mine sites was completed and outstanding penalties were paid.

After receipt of petitioners' complaints, BSGFO and CHFO issued 10-day notices (TDN's) to State officials. The field offices generally limited the substance of the TDN's to notice that there was "reason to believe" that the operator had failed to disclose its ownership and control status. The citizen groups eventually became dissatisfied with the progress of both Federal and State enforcement activity, judging that the field offices were too lenient in permitting State officials leeway in responding to the TDN's, were not authoritative in countering State delays with Federal enforcement action, and (even when Federal enforcement action was initiated, as in the case of Frush Enterprises 4/) the field offices

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fn. 3 (continued)
In 1988, OSM promulgated regulations defining "ownership and control" and revising regulations governing the permitting process in order to "secure greater compliance with the Act by preventing mining permits from being issued to persons who, either by themselves or through related persons, own or control violators of the Act." 53 Fed. Reg. 38868 (Oct. 3, 1988). Generally, the regulations pertaining to "ownership and control" which were at issue in these citizen complaints were the State counterparts of 30 C.F.R. §§ 773.5, 773.15, 773.20, 773.21, 778.13(c)(4)(d), 778.14(c), and 843.21 (1993).
4/ In the LaRosa Fuel/Frush Enterprises case (appeal docketed as IBLA 94-902, petition for expenses docketed as IBLA 95-323), petitioners charged ownership and control links between La Rosa Fuel Company and Frush Enterprises and various infractions of surface mining law and regulations by both companies. West Virginia responded to CHFO's TDN regarding whether LaRosa had violated "ownership and control" rules by failing to disclose its link to Frush Enterprises by stating that "it had absolved LaRosa of liability" for the uncorrected violations at the Frush site and would take no action in response to the TDN. The CHFO determined that the State response was inappropriate and referred the matter to the Applicant/Violator System Office for investigation. The citizens filed a request for informal review after no action was taken by OSM within a 4-month period. (IBLA 95-323 Petition at 2-6.)

exercised undue delay. (Petitions, generally, at 2-7.) The citizens ultimately filed requests for informal review of OSM's handling of the six complaints with the Director, OSM, pursuant to 30 C.F.R. § 842.15.

In their requests for review, the citizens faulted the field offices for failing to issue TDN's adequately encompassing all facets of the violations alleged. They maintained that the TDN's should have included all supported citizen allegations, including (among others) their allegations that permits were improvidently issued and that certain operators should be subject to permit blocks. The citizens requested the Director's office to instruct the field offices to undertake Federal enforcement in these instances. Further, complainants asserted that the facts demonstrated that the States were ineffectively implementing and enforcing the ownership and control regulations, among others. Complainants also requested that the Director accordingly notify the States pursuant to 30 C.F.R. § 733.12(b) that they were not effectively implementing their approved State programs.

In five of the cases, 5/ the OSM officials who reviewed the field office actions substantially granted the relief the citizens requested, other than that requested pursuant to 30 C.F.R. § 733.12(b). 6/ The OSM field offices were ordered to conduct Federal inspections of State permit records to determine whether the charged companies had, as complainants had alleged, failed to disclose all relationships required to be disclosed by the ownership and control rules. They were instructed that they should have issued TDN's for all allegations made by complainants where the complaint established a "reason to believe a violation exist[ed]." To the extent TDN's were not issued regarding improvidently issued permits, the appropriateness of permit blocks, or other alleged violations meeting the "reason to believe" threshold, the field offices were directed to do so. Petitioners nevertheless appealed these five cases to this Board seeking review of the denial of the 30 C.F.R. § 733.12(b) request.

In the sixth case, which involved Shannon Coal Company (petition for expenses IBLA 95-324), the Assistant Director denied petitioners relief on both the 30 C.F.R. § 733.12(b) request and on the question of whether OSM, on informal review, should have directed the CHFO to undertake a Federal inspection at one of Shannon's permit sites instead of instructing the field office to initiate a TDN to the State. In that case, petitioners appealed both issues to the Board. 7/

5/ These five cases (petitions for expenses) are IBLA 95-322, IBLA 95-323, IBLA 95-325, IBLA 95-326, and IBLA 95-476.

6/ We do not have before us the records in the underlying appeals, and we therefore rely on documentation supplied by the parties. Informal review decisions were supplied with OSM's answers in fee petitions IBLA 95-324, IBLA 95-325, IBLA 95-326, and IBLA 95-476, but not IBLA 95-322 or IBLA 95-323. In those two appeals, we accept petitioners' version of their success on informal review, which is not challenged by OSM.

7/ Petitioners claimed that Shannon was responsible for violations (including a bond forfeiture and unpaid civil penalties) at West Virginia Permit D-716, which they alleged had been unlawfully revived with Shannon as operator after it had expired. Petitioners alleged that, despite these

In all cases, instead of granting petitioners relief pursuant to 30 C.F.R. § 733.12(b) as requested, OSM indicated that it would treat their request as a petition for evaluation of the State program under 30 C.F.R. § 733.12(a). The regulations at 30 C.F.R. Part 733 outline procedures that OSM must use in determining whether to substitute Federal enforcement for all or part of a State program and/or in determining whether to withdraw Federal approval of a State program. They provide:

> (a) *Evaluation.* * * *
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> (2) Any interested person may request the Director to evaluate a State program. The request shall set forth a concise statement of the facts which the person believes establishes the need for evaluation. The Director shall verify the allegations and determine within 60 days whether or not the evaluation shall be made and mail a written decision to the requestor.
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> (b) If the Director has reason to believe that a State is not effectively implementing, administering, maintaining, or enforcing any part of its approved State program, the Director shall promptly notify the State regulatory authority in writing.

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fn. 7 (continued)
facts, the State had approved Shannon as operator on Permit No. U-4009-89 "which West Virginia had previously issued to Virginia Crews Coal Company." (IBLA 95-324 Petition at 4.) In response to CHFO's TDN, West Virginia reported that it would take no action, as Shannon was already blocked under different facts than those alleged in the citizens' complaint, and as Virginia Crews had severed any and all relationships with Shannon that would expose Virginia Crews to sanctions under ownership and control rules.

On informal review, the Assistant Director found that West Virginia had acted appropriately in blocking Shannon Coal from further permits, and referred the question of whether outstanding violations remained on permit D-716 back to the CHFO for further investigation, asserting that this issue had been raised for the first time on review. The Assistant Director construed the allegation regarding reviving expired permits as a citizen request for an evaluation of the West Virginia program pursuant to 30 C.F.R. § 733.12(a).

The citizens appealed to the Board on two grounds, asserting that (1) a referral back to CHFO to initiate a TDN to West Virginia regarding violations at Permit D-716 would cause unreasonable delay and that the Assistant Director should have required the CHFO to pursue alternative enforcement by conducting its own inspection at the site, and (2) OSM should have proceeded to give notice to the State pursuant to 30 C.F.R. § 733.12(b).

The substance of the disagreement between petitioners and OSM with regard to § 733.12 concerned whether, as petitioners claimed, OSM had (by the time matters had proceeded to the informal review stage) amassed sufficient information to proceed without further delay to notify the States pursuant to 30 C.F.R. § 733.12(b) of deficiencies in their programs and the potential for Federal intervention; 8/ or whether OSM correctly determined that OSM officials must always independently verify citizen allegations that a state program is being ineffectively administered pursuant to 30 C.F.R. § 733.12(a) regardless of facts developed pursuant to an informal review process. In other words, the citizens maintained that the facts presented on informal review may be sufficient in and of themselves for OSM to initiate proceedings under § 733.12(b); OSM contended that § 733.12(a) is not discretionary and an independent investigation of citizen allegations is always required when citizens request a formal, Federal evaluation of a state program.

The parties successfully negotiated a settlement of this dispute and moved the Board for dismissal of the six appeals on March 8, 1995. The settlement provided that (1) the merits of the appeals had been resolved; (2) OSM agreed to "establish and implement a plan within six months to assure the agency's compliance with the procedural requirements of 30 C.F.R. § 733.12 in verifying allegations whether there is reason to believe that a State is not properly implementing its approved program," including addressing what would be considered a timely decision of OSM under § 733.12(a); and (3) "before initiating any proceeding under 30 C.F.R. § 733.12(b) to evaluate a State program in response to the request of any person, OSM must first verify the allegations of any such request." (Joint Motion to Dismiss Appeals (Joint Motion), at 2-3.) The parties failed to agree on whether OSM was required in all cases to make such a decision within 60 days, but OSM agreed to provide assurances in the plan for providing an "interim response to the citizens specifying the additional period of time for reaching its decision and the reasons for such delay." (Joint Motion at 3.)

Thereafter, on April 30, 1995, OSM issued a directive on the subject: REG-36, entitled "Processing of Request to Evaluate a State Program under 30 C.F.R. 733.12(a)." The directive establishes specific procedures within OSM for processing allegations that State programs are performing

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8/ In its answers, OSM alleged that petitioners' "position, articulated at the level of informal review, was that, when a state has responded inappropriately to a * * * TDN, OSM's regulations require the immediate federal enforcement of all or part of the state program under * * * § 733.12(b)." (Answer in IBLA 95-476 at 2.) However, the Assistant Deputy Director for OSM did not characterize the citizens' position in quite these terms. See, e.g., Nov. 10, 1992, informal review decision (OSM's Answer in IBLA 95-476, Exhibit A, at 4).

inadequately on a systemic basis. It provides a detailed structure for OSM's review of such complaints, assigns OSM personnel at the regional level the responsibility for shepherding complaints through OSM's bureaucracy, designates how and by which personnel complaints will be processed, and establishes benchmark time frames for completion of the process.

Asserting that they had achieved a successful outcome in the six appeals, on April 3 and June 2, 1995, the citizens filed petitions with the Board for awards of fees and expenses, which were docketed by the Board as IBLA 95-322 through IBLA 95-325 and IBLA 95-476. Through an extensive briefing process spanning several years and allowing for the judicial resolution of KRC v. OSM, supra, rev'd sub nom. Kentucky Resources Council, Inc. v. Babbitt (KRC v. Babbitt), 998 F. Supp. 814 (E.D. Kentucky 1998) (see n.2), the parties ultimately narrowed the issues for the Board's consideration to the following:

> (1) Whether the settlement and various other elements of relief that the petitioners obtained in these cases merit fully compensatory fee awards;
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> (2) whether petitioners' fee awards should be reduced because the petitioners employed two senior attorneys to work on each case;
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> (3) whether evidence in the record supports petitioners' claims for Walton Morris' customary billing rates of $200 and $225 per hour; and
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> (4) whether petitioners' fee award should be reduced by assigning each of their attorneys a lower hourly rate for "less complex tasks such as telephone conferences, reviewing documents, and tasks that could be performed by a paralegal or secretary."

(Petitioners' Unopposed Motion to Consolidate; OSM's Surreply Memorandum to Petitions for Award of Fees and Expenses (OSM Surreply Memorandum).)

OSM concedes, based on the Court's ruling in KRC v. Babbitt, supra, that petitioners are entitled to some amount of fee award "because the six appeals were arguably catalysts for both the March 8, 1995, settlement agreement between the parties and the April 30, 1996, procedural directive." (OSM's Surreply Memorandum at 2.) However, OSM claims that, under Hensley v. Eckerhart, 461 U.S. 424, 440 (1983), the award should be circumscribed by the degree of petitioners' success on the merits. OSM asserts that such success, when measured against what petitioners demanded, was limited, since petitioners did not prevail in their attempts to force OSM to initiate enforcement action against the State programs pursuant to § 733.12(b) or force OSM to interpret § 733.12(a)(2) to include a mandatory 60-day deadline for verifying allegations of the need for evaluation of a State program. (OSM Answers at 10-14.) OSM further claims that petitioners have not documented their fee claims in a manner that would allow

the Board to evaluate which fees are allocated to which claims or to adjust the fees properly based on success or failure of particular claims. (OSM Answers at 12-15.) OSM concedes that hourly rates requested by Galloway are appropriate, but contests the hourly rates charged by Morris, arguing that they are inappropriately high in the market in which he worked in these cases. (OSM Answers at 15-17.) OSM further contends that it is inappropriate for both Galloway and Morris to charge partnership rates for working on the same case and for them to fail to set different rates of compensation for different types of litigation tasks. (OSM Surreply Memorandum filed Aug. 6, 1998, at 15-18.) Finally, OSM charges that the Board should reduce the amount of award to the extent petitioners assessed fees for the same amount of effort in each of the cases, since much of the work was assertedly duplicative and repetitive, as evidenced by the fact that the cases were eventually consolidated because they are so "substantially similar both as [to] the underlying facts and as to the legal issues raised." (OSM Surreply Memorandum at 2.)

Petitioners claim that most, if not all of the issues that OSM has raised have been previously decided in petitioners' favor either by the District Court in KRC v. Babbitt, supra, or by the Board in KRC v. OSM (On Judicial Remand), 151 IBLA 324 (2000). Petitioners claim that they have met the requirement set forth in Hensley v. Eckerhart, supra, for a full award of fees, since they have achieved "excellent results" on both procedural and substantive issues. They assert that they have demonstrated that the amounts submitted are reasonable fees (based upon reasonable hours expended and reasonable rates charged) and that OSM has not established that the "presumed reasonableness" of petitioners' "lodestar" should be adjusted downward.

[1, 2] Section 525(e) of SMCRA authorizes the Board, as the Secretary's delegate, to assess against OSM costs and expenses, including attorney fees, "reasonably incurred" by a person for or in connection with his participation in any administrative proceeding under the Act. 30 U.S.C. § 1275(e) (1994). The applicable regulation, 43 C.F.R. § 4.1294(b), further provides that the Department may award appropriate costs and expenses, including attorney fees, reasonably incurred by any person "who initiates or participates in any proceeding under [SMCRA], and who prevails in whole or in part, achieving at least some degree of success on the merits, upon a finding that such person made a substantial contribution to a full and fair determination of the issues." Such an award will only be made where the SMCRA proceeding "results in * * * [a] final order being issued" by an administrative law judge or the Board. 43 C.F.R. § 4.1290(a). However, the final order need not specifically address the merits of the appeal; rather, all that is required is that the proceeding conclude with a final order and that the person seeking the award have, in the course of the proceeding, prevailed in whole or in part, achieving some degree of success on the merits. KRC v. OSM, 137 IBLA

at 349-50, rev'd on other grounds, KRC v. Babbitt, supra. 9/ Thus, a person may be entitled to an award where the case is settled by mutual agreement of OSM and the appellant and where a final order is issued by the Board that does not resolve the merits of his appeal, but merely dismisses the appeal. Id.; see Harvey A. Catron, 146 IBLA 31 (1998). In this case, OSM concedes that petitioners are both eligible for an award and entitled to an award. The remaining issues relate to the amount of the award to which they are entitled.

A fee-setting inquiry begins with the "lodestar" -- the number of hours reasonably expended multiplied by a reasonable hourly rate, which is generally presumed to be fully compensatory. Hensley v. Eckerhart, supra at 433-34 (1983); Copeland v. Marshall, 641 F.2d 880, 891 (D.C. Cir. 1980); KRC v. OSM (On Judicial Remand), 151 IBLA at 328; Natural Resources Defense Council (NRDC) v. OSM, 107 IBLA 339, 373, 96 I.D. 89, 101-02 (1989). The reasonable hourly rate will normally be the rate "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984); Gateway Coal Co. v. OSM, 131 IBLA 212, 216 (1994); NRDC v. OSM, 107 IBLA at 393, 96 I.D. at 112 (1989). The fee applicant must produce satisfactory evidence of this rate, and the prevailing market rate is usually deemed to be reasonable. Blum v. Stenson, supra.

The underlying factual circumstances in the cases now before us are very similar to those of KRC v. OSM, supra, in which both the District Court and the Board eventually awarded substantial attorney fees. See KRC v. Babbitt, 97-9 (E.D. Ky.)(Memorandum Opinion (Mem. Op.), Mar. 5, 1999); KRC v. OSM (On Judicial Remand), supra. In that case, citizens filed complaints with the Lexington, Kentucky, Field Office (LFO), OSM, alleging that Branham & Baker Coal Company had failed to disclose its control of Deep River Mine, at which there were outstanding violations of surface mining regulations. The citizens asserted that Kentucky had improperly issued permits to Branham & Baker despite outstanding violations and requested rescission of Branham and Baker's permits, initiation of enforcement proceedings, reclamation of the sites, abatement agreements, and penalties. After issuing a TDN to Kentucky officials, the LFO granted four extensions of time within which to respond to the State over a 7-month period. Although Kentucky responded to the TDN by concluding

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9/ In KRC v. OSM, supra, we determined that it is not necessary that the Board decide a case on the merits in order for a petitioner to be entitled to attorney fees. However, we found in that case that substantially all relief was achieved by petitioners prior to their appeal to the Board; therefore there was no "causal nexus" between the appeal and corrective actions taken by OSM. We accordingly denied an award.

Finding that petitioners had in fact demonstrated the necessary "causal nexus," the District Court reversed our decision. KRC v. Babbitt, 998 F. Supp. at 819-21.

that Branham & Baker did not control the site, it was "forced to retract that decision for further review after the LFO supplied Kentucky with additional evidence concerning Branham's ownership and control." KRC v. Babbitt, 998 F. Supp. at 816. The citizens requested an informal review of LFO's actions on March 15, 1993. On April 5, 1993, the Acting Director of OSM issued a policy memorandum to OSM personnel indicating that investigations should last no longer than 30 days and extensions of time be allowed for no more than 15 days. On April 13, 1993, the LFO determined that Kentucky had failed to take appropriate action in response to the TDN. Thereafter, the LFO issued initial notice to Kentucky that it (the LFO) had reason to believe that permits had been improvidently issued to Branham & Baker. On April 30, 1993, OSM issued an informal review decision adopting the citizens' position on all issues except that OSM did not provide any procedural relief to the citizens other than that offered in the April 5 policy memorandum. KRC appealed to the Board, alleging that OSM had failed to provide sufficient procedural relief to ensure that delays in enforcement would not recur at the field level. On July 27, 1993, OSM issued a second policy memorandum "establishing new procedures to ensure the agency's timely and effective response to citizen's complaints." 998 F. Supp. at 817. Reversing our determination to the contrary, the District Court concluded that there was a "causal nexus" between the prosecution of the citizens' appeal and the corrective actions taken by OSM in response to the citizens' complaints (the actions set forth in the July 1993 memorandum issued by OSM) and found that the citizens were therefore entitled to fees and expenses.

In KRC v. OSM, both before the District Court and the Board, OSM argued that the award to citizens' attorneys should be reduced because, although petitioners achieved some success, they did not achieve a high degree of success, in that they did not prevail in their argument that they were entitled to fees based solely upon their work on informal review (which was determined by the Court not to come within the purview of the formal "administrative proceeding" contemplated by section 525(e) of SMCRA). OSM further claimed both before the District Court and the Board that attorneys Morris and Galloway duplicated work and that their hourly rates were excessive.

The District Court rejected the argument that the citizens' failure to prevail in all arguments they advanced before the Court warranted a reduction in fees, finding that "plaintiffs' arguments were based on a common core of facts and involved related legal theories, and plaintiffs were overwhelmingly successful in the outcome of this lawsuit." KRC v. Babbitt, Mem. Op. at 7. The District Court also rejected OSM's argument that Morris and Galloway should not both be permitted to bill time for work performed on the same pleadings. The Court determined that the record did not establish "over-lawyering" by Morris and Galloway, but established to the contrary that the overall number of hours expended was reasonable. The Court did, however, determine that Galloway was not entitled to nonlocal fees and, therefore, reduced his hourly rate from the $290

Washington, D.C., rate to $225, which was at the time at the upper end of the local rate scale in Lexington, Kentucky, where the litigation occurred. Likewise, Morris' rate was assessed at a local rate of $200 per hour.

In KRC v. OSM (On Judicial Remand), we addressed the question of what fees should be awarded to petitioners for their prosecution of the cases at the field office level, as well as before us both prior to issuance of our decision in KRC v. OSM and on judicial remand. We rejected OSM's argument that the amount of the award should be reduced by the amount of effort expended on unsuccessful alternative theories and claims, holding:

> As we noted in NRDC v. OSM, a petitioner may, in good faith, "'raise alternative legal grounds for a desired outcome,"' and be entitled to an award for work performed in that effort, even when those grounds are ultimately rejected and the desired outcome is achieved on some other basis. NRDC v. OSM, 107 IBLA at 371, 96 I.D. at 100 (quoting from Hensley v. Eckerhart, 461 U.S. at 435); see NRDC v. OSM, 107 IBLA at 371-73, 96 I.D. at 100-01. That is what occurred here.

KRC v. OSM (On Judicial Remand), 151 IBLA at 331. We also held that Morris provided adequate proof that he "regularly charged his noncontingent fee clients $200/hour prior to January 1, 1995, and $225/hour thereafter." Id. 151 IBLA at 333. We held that, to the extent the attorneys were prosecuting their petitions before OSM field offices, local rates applied. We also found Morris and Galloway to be of "reasonably comparable skill, experience, and reputation" and awarded them both local rates as submitted by Morris. (151 IBLA at 335.) The Board found no evidence of "overlawyering," and therefore permitted both Galloway and Morris to bill for reasonable time spent collaborating on pleadings.

Several of the issues raised by the parties in the instant cases are controlled by the reasoning set forth in the Court's Memorandum Opinion in KRC v. Babbitt, supra, and our decision in KRC v. OSM (On Judicial Remand), supra. We first consider OSM's assertion that petitioners' award should be reduced based on their failure to achieve success on all grounds advanced. In KRC v. OSM (On Judicial Remand), supra, the Board held that

> [w]hen a petitioner seeking attorney fees achieves substantial success on the merits of his claim, the fee award properly includes all time reasonably expended on the litigation including presentation of an alternative ground for success arising from the same facts and involving a related legal theory even though the alternative argument was rejected.

KRC v. OSM (On Judicial Remand), supra (syllabus). OSM has not convinced us that the degree of success in this case (for purposes of awarding attorney fees) is distinguishable from that achieved in the KRC cases. In both

the KRC appeals and the cases now before us, petitioners did not achieve all the relief they demanded; however, they did achieve substantial substantive and procedural concessions from OSM as a result of their appeals to the Board.

In negotiating a resolution of all six appeals, petitioners's salient interest was to secure the procedural safeguards necessary to permit the prosecution of citizen complaints alleging systemic deficiencies in State program administration in a timely and effective manner. Given the exigencies that developed subsequent to receipt of the citizens' complaints by OSM field offices, we do not perceive petitioners' demands for enforcement pursuant to § 773.12(b) to have been frivolous. As OSM has admitted, these demands acted as a catalyst for negotiations between the parties. Those negotiations resulted in substantial procedural gains for petitioners in prosecuting future citizen complaints under circumstances where citizens allege that State action is systemically unsatisfactory or dilatory to the point of failing to meet essential program requirements.

We hold that petitioners are entitled to a full award of fees and expenses, even though they did not ultimately prevail on their theory that OSM should have proceeded to formally notify the States pursuant to 30 C.F.R. § 733.12(b) that it was undertaking formal review of the State programs based upon petitioners' allegations on informal review, or on the demand that OSM verify complaints against State program performance within a 60-day mandatory deadline. In its Memorandum Opinion in KRC v. Babbitt, the Court stated: "[T]he plaintiffs' fee should not be reduced by this court's rejection of one of plaintiffs' arguments. The plaintiffs' arguments were based on a common core of facts and involved related legal theories, and plaintiffs were overwhelmingly successful in the outcome * * *." (Mem. Op. at 7.) We are likewise satisfied that petitioners' claims now before us grew out of a common core of facts and involved related legal theories. Petitioners achieved a high degree of success on their claims.

We next take up the question of what is an appropriate hourly rate of compensation for petitioners' attorneys. OSM has not contested the hourly rates claimed by Galloway. See, e.g., Answer in IBLA 95-322 at 15; Answer in IBLA 95-323 at 14. In their reply briefs, petitioners reduced the hourly rate they are claiming for Morris from prevailing Washington, D.C., rates to Morris' customary billing rate of $200 per hour before January 1, 1995, and $225 thereafter.

In this case, we follow District Court precedent set forth in the Memorandum Opinion in KRC v. Babbitt, supra, and Board precedent in KRC v. OSM (On Judicial Remand), supra, in ruling that practice before local OSM field offices must command fees based on local, rather than national market rates. Therefore, for practice before the States, the BSGFO and the CHFO, both Morris and Galloway are entitled to receive fees based on local market rates.

The parties have submitted no evidence of the fees that local Federal practice in Big Stone Gap, Virginia, or Charleston, West Virginia, commands. However, we take official notice of two facts: The District Court found that local rates for persons of high expertise in the field in Lexington, Kentucky, were $225 per hour at the time of that litigation; and the Court awarded Galloway an hourly rate of $225 and Morris a rate of $200 per hour. KRC v. Babbitt, Mem. Op. at 16. As we did in KRC v. OSM (On Judicial Remand), supra at 333-35, in the absence of evidence to the contrary, we will use Morris' customary billing rates for paying surface mining clients, as buttressed by evidence of local practice rates in the nearby region of Lexington, Kentucky, as evidence of the appropriate hourly rates for computing the fees to be awarded in this case. 10/ See People Who Care v. Rockford Board of Education, 90 F.3d 1307, 1311-14 (7th Cir. 1996); National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1326 (D.C. Cir. 1982); Harvey A. Catron, supra at 36; Gateway Coal Co. v. OSM, supra at 216-17; NRDC v. OSM, 107 IBLA at 393-95, 96 I.D. at 112-13.

For practice that Galloway has shown occurred before Washington, D.C., OSM offices, we award his customary Washington, D.C., billing rate as it is reflected in his billing statements. Where we cannot determine from billing statements precisely whether the work was undertaken for practice before local or national offices, we award Galloway fees at the lesser rate.

Fees are properly assessed for the collaborative work of two lead attorneys in instances where work is not duplicated. See KRC v. Babbitt, Mem. Op. at 10-11. We have reviewed and compared billing statements submitted by Galloway and Morris in the six cases before us and are satisfied that Galloway and Morris collaborated on the work related to the six appeals, but did not unnecessarily duplicate work. Billing statements submitted by both attorneys indicate that Galloway and Morris often broadly divided tasks as lead and reviewing attorney and did not bill the same hours for work performed on the same task. OSM has not pointed to evidence of "overlawyering"; nor do we find any.

We find no reason to reduce the awards based upon either Galloway's or Morris' failure to assess fees based upon rates commensurable to lesser tasks performed. Galloway has submitted statements indicating reasonable use of paralegal assistance to compile and calculate billing statements; he will accordingly be reimbursed fees at $40 per hour as submitted for that

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10/ See KRC v. OSM (On Judicial Remand), 151 IBLA at 333. Morris' practice is located in Charlottesville, Virginia, which lies east of the Appalachian Mountains outside of mining regions in southwestern Virginia where much coal mining takes place. Lexington, Kentucky, is located west of the Appalachian chain just outside of the Kentucky coal fields.

service. We find no evidence that Morris and Galloway have billed attorney rates for clerical or lesser work that was not performed as properly ancillary to the exercise of their legal expertise; nor has OSM provided any such evidence.

OSM charges that consolidation of the six appeals constitutes evidence that the appeals were so substantially similar that much of the work was repetitive, so that petitioners' fees should be reduced to properly reflect the actual work performed. We have scrutinized the hours billed to each case in pursuit of the comprehensive settlement agreement. By that time, the cases had developed to the point that both petitioners and OSM were conceptualizing them in terms of a focal issue concerning OSM's enforcement procedures pursuant to 30 C.F.R. § 733.12. Galloway billed a total of 52 hours for his work on comprehensive settlement of the six cases, with the following breakdown per case: IBLA 95-322, 4 hours; IBLA 95-323, 1.75 hours; IBLA 95-324, 1 hour; IBLA 95-325, 7.5 hours; IBLA 95-326, 9.25 hours; and IBLA 95-476, 28.5 hours. 11/ On the record before us, we find no indication that, even at the point of settlement, when the cases had developed to the narrowest common issue, the hours billed by petitioners are unreasonable. The six individual cases, although consolidated, retained differences that had to be accounted for in preparing a settlement, and petitioners must be permitted time to scrutinize a consolidated strategy in terms of its impact on individual cases. OSM has provided no factual basis for its assertions that, on the record before us, consolidation yielded substantial economies of scale to petitioners' attorneys that are not reflected in the hours billed.

We do find one instance of a noncompensible billing. In the billing statements submitted with IBLA 95-323, involving the Frush/La Rosa appeal, Galloway billed 3.25 hours for work related to reviewing an IBLA decision regarding a "30-day" issue and filing a Petition for Reconsideration before the Board. Our review of docket records at the Board indicates that, in connection with the La Rosa/Frush informal review, WVHC filed an appeal before the Board, IBLA 94-728, asking the Board to order OSM to complete its informal review process related to the Frush/La Rosa citizens' complaint within 30 days. WVHC did not prevail in that appeal. See West Virginia Highlands Conservancy, 130 IBLA 295 (1994). WVHC's request for reconsideration of that decision was likewise denied by order dated September 27, 1994. Appellants could not have prevailed in a request for attorney fees in that case had they filed a separate petition before the Board because they did not prevail on the merits. In any event, fees for work on that appeal are not properly before the Board in this action; we therefore deduct the amount billed by Galloway for time spent prosecuting IBLA 94-728.

11/ Morris played a subsidiary role in the comprehensive settlement negotiations, billing a total of 5.5 hours to settlement proceedings.

A detailed breakdown of our calculations of amounts of fees and expenses due petitioners on a per case basis is set forth in Appendix 2. The total amount of fees and expenses due petitioners is $141,179.31.

Accordingly, pursuant to the authority delegated to the Board by the Secretary of the Interior, 43 C.F.R. § 4.1, petitions for fees and expenses in the above-captioned cases are granted in part, as set forth in Appendix 2.

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David L. Hughes
Administrative Judge

I concur:

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Bruce R. Harris
Deputy Chief Administrative Judge

APPENDIX 1

IBLA No.	Appellant(s)	OSM No(s). and Field Office	Prior Appeal
95-322	National Wildlife Federation, Citizens' Coal Council (NWF, CCC)	94-31-ABC 94-3-AMBROSE Big Stone Gap	IBLA 95-261 IBLA 95-262
95-323	West Virginia Highlands Conservancy (WVHC)	94-19-FRUSH Charleston	IBLA 94-902
95-324	WVHC	94-26-SHANNO Charleston	IBLA 94-821
95-325	WVHC	94-4-Snowshoe Charleston	IBLA 94-305, 94-440
95-326	WVHC	94-5-USC Charleston	IBLA 94-406
95-476	NWF, CCC	94-2-CCC Big Stone Gap	IBLA 94-603

Appendix 2

Attorney's Fees							
		Hours	Rate	Fee	Paralegal	Expenses	Total
IBLA 95-322							
	Galloway						
		48.75	$ 200	$ 9,750.00			
		1.75	260	455.00			
		10.75	270	2,902.50			
		9.25	280	2,590.00			
	Subtotal	70.50		$15,697.50	$ 140.00	$ 297.10	$16,134.60
	Morris						
		20.25	$ 200	$ 4,050.00			
		4.00	225	900.00			
	Subtotal	24.25		$ 4,950.00	0.00	$ 54.34	$ 5,004.34
	Total	94.75		$20,647.50	$ 140.00	$ 351.44	$21,138.94
IBLA 95-323							
	Galloway						
		3.25	0	0.00			
		30.25	$ 200	$ 6,050.00			
		6.25	270	1,687.50			
		13.50	280	3,780.00			
	Subtotal	53.25		$11,517.50	$ 320.00	$ 142.42	$11,979.92
	Morris						
		55.75	$ 200	$11,150.00			
		3.25	225	731.25			
	Subtotal	59.00		$11,881.25	0.00	$1,094.73	$12,975.98
	Total	112.25		$23,398.75	$ 320.00	$1,237.15	$24,955.90

IBLA 95-324							
	Galloway						
		12.25	$ 200	$ 2,450.00			
		4.00	270	1,080.00			
		6.25	280	1,750.00			
	Subtotal	22.50		$ 5,280.00	0.00	$ 39.15	$ 5,319.15
	Morris						
		18.25	$ 200	$ 3,650.00			
		5.75	225	1,293.75			
	Subtotal	24.00		$ 4,943.75	0.00	$ 15.39	$ 4,959.14
	Total	46.50		$10,223.75	0.00	$ 54.54	$10,278.29
IBLA 95-325							
	Galloway						
		32.00	$ 200	$ 6,400.00			
		1.25	270	337.50			
		16.50	280	4,620.00			
	Subtotal	49.75		$11,357.50	$ 260.00	$ 164.75	$11,782.25
	Morris						
		19.00	$ 200	$ 3,800.00			
		1.50	225	337.50			
	Subtotal	20.50		$ 4,137.50	0.00	$ 51.72	$ 4,189.22
	Total	70.25		$15,495.00	$ 260.00	$ 216.47	$15,971.47
IBLA 95-326							
	Galloway						
		32.75	$ 200	$ 6,550.00			
		10.00	270	2,700.00			
		16.50	280	4,620.00			
	Subtotal	59.25		$13,870.00	$ 340.00	$ 160.82	$14,370.82
	Morris						
		27.25	$ 200	$ 5,450.00			
		1.50	225	337.50			
	Subtotal	28.75		5,787.50	0.00	114.38	5,901.88
	Total	88.00		$19,657.50	$ 340.00	$ 275.20	$20,272.70

IBLA 95-476							
	Galloway						
		28.00	$ 200	$ 5,600.00			
		6.00	270	1,620.00			
		65.50	280	18,340.00			
	Subtotal	99.50		$25,560.00	$ 420.00	$ 150.24	$26,130.24
	Morris						
		90.25	$ 200	$18,050.00			
		15.50	225	3,487.50			
	Subtotal	105.75		$21,537.50	0.00	$ 894.27	$22,431.77
	Total	205.25		$47,097.50	$ 420.00	$1,044.51	$48,562.01
Total Galloway							$85,716.98
Total Morris							$55,462.33
Grand Total							$141,179.31